No. 88-523 (3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.,
Petitioner,

v.

KELLY MERK, et al.,
Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Can a Union adequately represent the interests of active and former workers within a single bargaining unit where the interests of former workers are in direct conflict with the interests of the active members of the bargaining unit?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

STATEMENT 1

REASONS FOR DENYING WRIT 2

I. THE ISSUES RAISED BY PETITIONER ARE NOT OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW 2

II. THE PRESENT CASE IS NOT RIPE FOR REVIEW BY THIS COURT. 4

III. THE LOWER COURTS' RULINGS DO NOT CONFLICT WITH OTHER CIRCUITS' DECISIONS 6

IV. THE OPINIONS BELOW PROPERLY APPLIED THIS COURT'S PRECEDENTS 7

CONCLUSION 14

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

TABLE OF AUTHORITIES

Cases: *Page(s)*

Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass, 404 U.S. 157 (1971) .. 8, 9, 10

American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980) 5

Anderson v. Alpha Portland Industries, Inc., 752 F. 2d 1293 (8th Cir. 1985) (en banc), *cert. denied*, 471 U.S. 1102 (1985) 11, 12

Chicago Web v. Chicago Tribune, 657 F. Supp. 351 (N.D. Ill. 1987) 4

Glover v. St. Louis - San Francisco Railway Co., 393 U.S. 324 (1969) 7

Koshatka v. Philadelphia Newspapers, Inc., 762 F . 2d 329 (3d Circuit 1985) 6

Kwak v. Joyce, 683 F. Supp. 1546 (N.D. Ill. 1988) 4

Merk v. Jewel, 641 F. Supp. 1024 (N.D. Ill. 1986) ..... *passim*

Merk v. Jewel, 848 F. 2d 761 (7th Cir. 1988) 00

Niro v. Fearn International, Inc., 827 F.2d 173 (7th Cir. 1987) 4

Ozite Corp. v. Upholsterers International Union, 671 F. Supp. 565 (N.D. Ill. 1987) 4

Pennsylvania Railroad Co. v. Day, 360 U.S. 548 (1959) 10

Republic Steel v. Maddox, 379 U.S. 650 (1965) 10, 12

Cases: *Page(s)*

Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984) 7, 10, 11

U.S. v. Mendoza, 464 U.S. 154 (1984) 4

Vaca v. Sipes, 386 U.S. 171 (1967) 7

FEDERAL STATUTES:

29 U.S.C. Section 185 (1982) 5

29 U.S.C. Section 152(3) (1982) 8

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, KELLY MERK, et al., respectfully oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

STATEMENT

Respondents in the present suit are former employees of Jewel Food Stores, a Division of Jewel Companies, Inc. ("Jewel") and former members of the United Food

and Commercial Workers Union Local No. 881 ("Union"). Respondents were employed by Jewel on February 26, 1984, when Jewel unilaterally reduced wages and benefits to over 18,000 Jewel employees. Jewel implemented the forced pay and benefit cuts pursuant to an alleged oral reopener agreement which Jewel contends was reached prior to the execution and ratification of the 1982-1985 collective bargaining agreement. The Union denied the existence of an oral reopener and filed suit against Jewel to compel arbitration and enforce the subject collective bargaining agreement. The grievance initiated by the Union was resolved in June of 1985 after Jewel agreed to award retroactive pay and restore certain benefits to all persons who were employed by the Company as of June 21, 1985. The Union sent the settlement proposal to its current membership with the recommendation that its membership accept the proposal which excluded Respondents and the proposed class.

Respondents include retirees and other persons who terminated from Jewel during the fifteen months of protracted litigation prior to the grievance resolution. At the time of the resolution, the Respondents were no longer dues paying members of the Union and accordingly did not have the power to vote or exercise political power within the Union structure. The Respondents were not notified of the proposed grievance resolution, the terms of the resolution or the fact that the resolution would only pertain to those persons employed as of June 21, 1985.

REASONS FOR DENYING WRIT

I. THE ISSUES RAISED BY PETITIONER ARE NOT OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW

This case presents a rare and unusual factual situation which was narrowly decided and limited by the lower courts to its unique facts and the litigation strategies adopted by the parties.

> We must emphasize the narrowness of our holding that the Union owed no duty of fair representation to plaintiffs when the settlement was reached. It depends both on plaintiffs' status as ex-employees of Jewel and on the serious conflict of interest between their narrow interests and the interests of other employees. Neither side cited, and we did not find, any case like this one, and given the rare circumstances, we think Jewel cries wolf when it laments that "acceptance of plaintiffs' position in this regard would effectively preclude management from *ever* relying on Union resolution of a grievance for *anyone* that was not currently employed. Management would be deprived of the benefit of its contractual bargain, and the collective bargaining relationship would be serious undermined." (Emphasis added) Our holding carries no such broad ramifications.

Merk v. Jewel, 641 F. Supp. 1024, 1032 (N.D. Ill. 1986). In its Memorandum Order denying Petitioner's motion for reconsideration, the district court stated:

> But the conflict in this case is special and unusual, as it involves former employees with a discrete conflict of interest with current employees .... Also, despite Jewel's argument to the contrary, we continue to believe that this case is rare and poses no threat to the sanctity of the collective bargaining system.

Memorandum Order at 2 (Appendix A). The court of appeals noted that the case before it did not present a "run-of-mine" conflict. *Merk v. Jewel*, 848 F. 2d 761, 765 (7th Cir. 1988).

Moreover, the court of appeals repeatedly made clear that its resolution was closely tied to the parties' presentation of the issues and ruminated at some length on the propriety of alternative approaches. The court did "not speculate on the implications of such an approach for future litigation," and was "left with the district court's" approach to the issues. 848 F. 2d at 766.

There is therefore little reason to believe that this case will have any appreciable impact beyond its unique facts.[1]

Furthermore, the issue which Petitioner seeks to have this Court review is whether its breach of the labor contract will be litigated in the context of a direct action by former employees or whether it will be determined in the context of the Union's duty of fair representation. If this case proceeds, unreviewed by this Court, the parties will litigate a straightforward breach of contract action between a group of former employees and their former employer. Should this Court intervene and reverse the decision below, Respondents will continue to litigate the breach of contract action against Petitioner in a hybrid action. Respondents' additional burden of showing that the Union breached its duty of fair representation appears to have been met.[2]

II. THE PRESENT CASE IS NOT RIPE FOR REVIEW BY THIS COURT

The district court characterized the case before it as one of first impression. 641 F. Supp. at 1025. In the exercise of its discretion, this Court will frequently await the development of a conflict between the circuits in order to gain the benefit of analysis by other courts before exercising its prerogative as final arbiter of federal law. *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984). Granting a writ of certiorari in this case, which presents novel issues, would

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[1] Every case which has cited the district court's opinion with respect to the statute of limitations issue has found it persuasive. *Niro v. Fearn International, Inc.*, 827 F. 2d 173, 177 (7th Cir. 1987); *Kwak v. Joyce*, 683 F. Supp. 1546, 1549 (N.D. Ill. 1988); *Ozite Corp. v. Upholsterers International Union*, 671 F.Supp. 565, 567 (N.D. Ill. 1987); *Chicago Web v. Chicago Tribune*, 657 F. Supp. 351, 357 (N.D. Ill. 1987). The court of appeals handled the statute of limitations issue in a footnote. It is clearly not an issue of sufficient importance to warrant a grant of certiorari.

[2] *See, Merk v. Jewel*, 641 F. Supp. 1024, 1028, fn.4 (N.D. Ill. 1986); *Merk v. Jewel*, 848 F. 2d 761, 767 (7th Cir. 1988).

defeat that salutary purpose. Review of this case at this time would sacrifice this Court's scarce resources on a non-controversial issue.

Secondly, while Petitioner's arguments, as framed below, center on the Union's duty of fair representation, Petitioner extensively discusses for the first time here its contention that Respondents must exhaust Union mediated contractual grievance procedures before bringing an action under Section 301, 29 U.S.C. 185. The issue of whether Respondents are required to exhaust contract grievance procedures is presently being litigated before the district court. Petitioner has moved in the district court to dismiss under Rule 12(b)(6), arguing that the Respondents, even if not represented by the Union, have a duty to exhaust the grievance and arbitration procedures contained in the collective bargaining agreement.[3]

Assuming, arguendo, that Petitioner's motion to dismiss were granted by the district court, the issues raised before this Court would be rendered moot. The interlocutory nature of this appeal when coupled with the pendency of a dispositive motion in the district court results in the likelihood that this Court's opinion will be merely advisory. Such a result violates a basic principle upon which our judicial system is premised, namely that two courts cannot have jurisdiction over the same case at the same time. *American Export Lines, Inc. v. Alvez,* 446 U.S. 274, 289 (1980).

Moreover, due to the interlocutory nature of this case many legal issues remain to be decided relating to both liability and damages.[4]

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[3] A copy of Petitioner's pending motion to dismiss is attached as Appendix B.

[4] Respondents have presently pending in the district court a motion for partial summary judgment.

Review by this Court of the issues decided below will not result in a final determination on the merits of Respondents' claims. Petitioner's attempt to have select legal issues resolved in a piecemeal fashion should not be countenanced by this Court.

III. THE LOWER COURTS' RULINGS DO NOT CONFLICT WITH OTHER CIRCUITS' DECISIONS

Petitioner contends that the lower court decisions conflict with *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F. 2d 329 (3d Cir. 1985). The inappropriateness of this argument is suggested by the failure of the court of appeals to discuss this case, despite Petitioner's citation of it to that court. Petitioner relies on *Koshatka* as support for its position that the Union, once it undertook representation of plaintiffs, was bound to continue that representation. However, the cases are factually and legally unrelated. Unlike the present case, in *Koshatka*, there were no conflicting interests between the individual and the Union. In *Koshatka*, the plaintiff sought to become a full time employee and be included in the bargaining unit, since his part-time duties had expanded to greater time and responsibility than the full time Union members. The lack of an actual conflict between employee and union was crucial to the court's decision and an issue which caused it concern.

> We have a special concern here because of the unfortunate possibility that the Guild may be more interested in having Guild members perform appellant's work than in effectively pressing his grievance. The Guild's future conduct should be strictly scrutinized for possible conflicts of interest.

762 F. 2d at 336.

In *Koshatka*, the conflict between the employee and his Union was inchoate, but still a matter of concern for the court. In the present case, the conflict between the inter-

ests of Union and narrow interest of the former employees was fully developed and found to preclude the effective representation of former employees by the Union. Further highlighting the distinction, in *Koshatka*, the plaintiff sought to *become* a member of the larger Union bargaining unit; in effect to become an "employee." Plaintiff sought to protect his interests by joining with others who shared those interests. In this case, Respondents left the bargaining unit and severed all ties to the unit, save the single interest in recovering their earned but unpaid wages. This crucial distinction makes *Koshatka* inapposite.

IV. THE OPINIONS BELOW PROPERLY APPLIED THIS COURT'S PRECEDENTS

Petitioner contends that the decisions of the lower courts stand in conflict with previous decisions of this Court which create a presumption in favor of Union mediated arbitration for the interpretation of collective bargaining agreements. Petitioner contends that since the grievance arose under the contract, it must be governed by the contractual enforcement procedures. However, this Court has never held that aggrieved employees must utilize the contractual grievance procedures in all situations. In fact, this Court has frequently identified situations in which individuals with rights created under a collective bargaining agreement may proceed individually to vindicate their claims against a recalcitrant employer. *Vaca v. Sipes*, 386 U.S. 171, 185 (1967), excuses the obligation to employ Union based remedies in those situations where the employer repudiates the contractual arbitration procedures. In *Glover v. St. Louis - San Francisco Railway Co.*, 393 U.S. 324, 330 (1969), this Court held that an employee may proceed directly against his employer when the effort to proceed with formal contractual or administrative remedies would be futile. In *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), this Court held that employee benefit fund trustees need not utilize

the arbitration procedures contained in the collective bargaining agreement to enforce their rights under the agreement.

These cases make clear that the preference for private dispute resolution is far from an absolute rule. Courts may, in appropriate circumstances, permit direct actions by aggrieved individuals for enforcement of collective bargaining agreements. Petitioner's assertion that the lower courts' decisions conflict with this Court's rulings oversimplifies the analysis this Court and other courts have used in determining whether a direct action is permissible. This Court has frequently held that the preference for Union mediated contractual grievance and arbitration procedures will be put aside in those circumstances where the use of the Union conduit is not appropriate.

A proper understanding of the decisions below rests on an understanding of the lower courts' analysis of *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971). *Pittsburgh Plate Glass* holds that the statutory definition of employee found in NLRA Section 2(3), 29 U.S.C. Section 152(3), may not be separated from those rights guaranteed under Section 7 of the Act, particularly the right to bargain collectively in an appropriate unit. In seeking to determine whether retirees fit within the statutory definition of employee, the Court reaffirmed that "in doubtful cases resort must still be had to economic and policy considerations to infuse Section 2(3) with meaning." 404 U.S. at 168. By looking to the policies underlying the Act, the Court in *Pittsburgh Plate Glass* established that the statutory definition of employee necessarily includes a community of interest analysis.[5]

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[5] This Court held in *Pittsburgh Plate Glass:*

> In this cause, in addition to holding that pensioners are not 'employees' within the meaning of the collective-bargaining obligations of the Act, we hold that they

(Footnote continued on the following page)

The essence of the Court's analysis is the recognition that retirees' interests are inherently in conflict with the interests of active employees. As a result of this conflict, they may not be properly included within the collective bargaining unit with active employees.

> Here, even if, as the board found, active and retired employees share a common concern in assuring that latter's benefits remain adequate, they plainly do not share a community of interest broad enough to justify inclusion of the retirees in a bargaining unit. Petitioners' interests extend only to retirement benefits, to the exclusion of wage rates, hours, working conditions and all other terms of active employment. Incorporating such a limited purpose constituency in the bargaining unit would create the potential for severe internal conflicts that impair the unit's ability to function and would disrupt the processes of collective bargaining. Moreover, the risk can not be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favorable to active employees at the expense of retirees' benefits.

404 U.S. at 173. Inherent in the definition of employee under the NLRA is the notion that employees share common interests and goals and therefore may act together to bargain collectively or take other concerted action utilizing their economic weapons and advancing their economic interests. "The term 'employee' must be understood with reference to the purpose of the act and the facts involved in the economic relationship." [Citation omitted] 404 U.S. at 167.

The decisions of the lower courts exclude Respondents from the definition of employee because Respondents lack

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5 *(Continued)*

were not and could not be 'employees' included in the bargaining unit. 404 U.S. at 172.

the common interests and goals which the Act seeks to foster and protect. The retirees in *Pittsburgh Plate Glass* were not excluded from the definition of employee simply because they were no longer working. *Compare, Pennsylvania Railroad Co. v. Day*, 360 U.S. 548 (1959). More importantly, as retirees, they lacked a community of interests with active workers sufficient to justify inclusion of them in a common bargaining unit. The statutory definition of employee necessarily incorporates the notion of common interests and, where interests diverge, appropriate individuals must be excluded from the bargaining unit.

It is the conflict of interest analysis that was of the greatest interest to the district court and court of appeals. Respondents, like the retirees in *Pittsburgh Plate Glass*, had a narrow, single interest. They were a "functionally distinct minority," 404 U.S. at 172, with a single, narrow interest in obtaining lost wages. The district court repeatedly emphasized the profound and inherent conflict which the Union faced in representing both active and former employees. In addition to the obvious semantic observation that "former employees" are not "employees," the lower courts recognized that Respondents were not employees within the meaning of the Act to the extent that their interests were in conflict with active employees.

A similar result can be reached using the analytic framework developed in *Schneider*. In *Schneider*, this Court reasoned that the presumption of arbitrability (which *Republic Steel v. Maddox*, 379 U.S. 650 (1965), makes clear is intertwined with the Union's duty of fair representation) is designed to further the national labor policy of peaceful resolution of labor disputes by requiring the parties to forego the economic weapons of strikes and lockouts. This Court refused to apply that presumption in the context of enforcing the terms of a collective bargaining agreement when the party seeking to enforce the agreement had no recourse to economic weapons.

> Arbitration promotes labor peace because it requires the parties to forego the economic weapons of strikes and lockouts. Because the trustees of employee benefit funds have no recourse to either of those weapons, requiring them to arbitrate disputes with the employer would promote labor peace only indirectly, if at all.

466 U.S. at 372. Respondents, like the trustees in *Schneider*, have no recourse to economic weapons. They were "an isolated and submerged minority sect." 641 F.Supp. at 1030. They are neither members of the Union nor employees of the company. While active members might reasonably forego the lost wages resulting from the employer's unilateral wage and benefit cuts in exchange for more wages, benefits or job security in the future, Respondents had nothing to trade. They had no economic weapons at their disposal and so posed no threat to labor peace. The Respondents' economic weakness removes the justification for reliance on Union mediated grievance resolution which Petitioner emphasizes so heavily. In the absence of this justification, there is no reason to prefer a Union mediated remedy, and a direct action may be maintained.

The interaction of *Pittsburgh Plate Glass* and *Schneider* was carefully analyzed by the court in *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985) (en banc), *cert. denied*, 471 U.S. 1102 (1985). The *Anderson* court concluded that retirees need not exhaust union mediated contract grievance procedures and could pursue a direct action against the employer for breach of the collective bargaining agreement. The court analyzed the position of retirees to determine whether they had more in common with the trustees considered by the *Schneider* court or with active employees. The court followed the analysis used in *Pittsburgh Plate Glass* to conclude that retirees' interests often conflicted with those of active workers and that retirees have no recourse to economic weapons. Therefore, the court followed the lead of

Schneider to determine that the presumption of arbitrability was not applicable. 752 F.2d at 1297-98.

The defendant in *Anderson*, like the Petitioner here, contended that *Maddox* and its progeny required union mediated arbitration based on the Union's exclusive representation of employees. The court rejected this contention:

> The cases cited by Alpha do not justify letting a union mediate the interests of a 'functionally distinct minority' which can not be made part of the bargaining unit and which, as the Supreme Court pointed out, does not have a vote in union affairs.

752 F.2d at 1297. The *Anderson* court realized, like the lower courts here, that *Maddox* and its progeny are not applicable in the situation where there is a significant conflict among the interests of beneficiaries to a collective bargaining agreement. The *Anderson* court's analysis establishes that the decisions in the present case are logical and appropriate extensions of the analysis used by this Court to define the scope and extent of a union's right and duty of exclusive representation. In this rare case where a functionally distinct minority of individuals exists, with a narrow interest in sharp conflict with the majority interests, the presumption in favor of exclusive representation must give way to the individual employees' ability to pursue a direct remedy against an employer who has breached the collective bargaining agreement. The district court's holding that the right of exclusive representation and its correlative duty of fair representation are vitiated only when the plaintiffs are both ex-employees *and* have a serious conflict between their narrow interest and broader interests of active employees does not conflict with the holdings of this Court or violate federal labor policy. *Merk*, 641 F. Supp. at 1031.

In addition, the result below equitably resolves the case between the parties. Implicit in the decisions below is the recognition that Petitioner must not be allowed to

profit by placing the Union in the untenable position of representing the completely divergent interests of active and former Union members. As the district court astutely observed:

> If Jewel 'relied' on anything, we suspect it relied on its own bargaining gamble that it could save a great deal of money by trying to bind plaintiffs to a deal in which they were as a practical matter unrepresented and powerless. If Jewel thought it could profit by the inherent conflict of interest in this case and bind plaintiffs to the result, it was simply mistaken and must live with the consequences. The new contract is not undermined as a result. Jewel simply make a false legal assumption in signing it. And far from 'depriving management of its contractual bargain,' our result will help ensure that Jewel lives up to its original bargain and that plaintiffs enjoy the benefit of that bargain.

641 F.Supp. at 1032.

In summary, the decisions below properly synthesize the precedents of this Court to effectuate national labor policy and resolve a difficult and novel question.

CONCLUSION

For the reasons set forth above, Respondents Kelly Merk, et al., respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Date: October 27, 1988

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KELLY MERK, JOSEPH STASZEWSKI, VICKIE MENAGH, DONNA McCORMICK, DAVID THERKIELD, JOHN MALONE, MARLENE WAGNER, MICHAEL DEMARE, WAYNE VOLKER, ELEANORE COLLINS, ANDREW KACHIK and PATRICIA TODD, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., AMERICAN STORES COMPANY, INC., and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 881, Chartered by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO and CLC,

Defendants.

NO. 85 C 7876

MEMORANDUM ORDER

MARVIN E. ASPEN, District Judge:

A.

For the reasons that follow, Jewel's motion to reconsider the Court's June 26, 1986 opinion is denied.

With respect to the "duty of fair representation" issue, *see* June 26 opinion at 6-16, Jewel says little it did not say earlier, and we adhere to our analysis in the opinion. Jewel continues to give short shrift to the nature and depth of the conflict of interest in this case. We agree with Jewel's

uncontroversial premise that unions often balance conflicts between groups of employees, and that under typical labor law cases they still have a duty to represent all groups fairly. But the conflict in this case is special and unusual, as it involves *former* employees with a discrete conflict of interest with current employees. As the *Allied Chemical* case teaches, 404 U.S. at 172-75, 92 S.Ct. at 394-96, where conflicts between current and former employees are sharp, and where a powerful majority group with many interests will likely dominate a discrete minority with limited interest, the former employees can no longer be considered appropriate members of the bargaining unit, subject to the union's representation. We continue to believe that *Allied Chemical* is closely analogous to this case, and that it supports our holding that the Union owed no duty to plaintiffs.

Also, despite Jewel's arguments to the contrary, we continue to believe that this case is rare and poses no threat to the sanctity of the collective bargaining system. We disagree with Jewel that our opinion will give an incentive to employees involved in a labor dispute to quit and seek an individual remedy rather than stay on the job, bound to the Union's representations. More likely than this far-fetched scenario is the other side of the coin: a holding contrary to ours could encourage unscrupulous employers to cut wages and benefits unilaterally and drag out a battle with a union, hoping that, as employees leave as part of normal attrition during the long delay, it could play upon the conflict between former employees and union members and save money by reaching a settlement freezing out those employees who left. In any event, putting aside speculation about the effect of our holding on future cases, we think that the failure of the parties and the Court to find reported cases like this one demonstrates that this type of case will not be common, and that the impact of our holding is limited to the unusual fact pattern of this case.

Turning to the statute of limitations issue, we find that Jewel offers nothing significant that it did not argue earlier. We stand by our opinion and deny that part of the motion to reconsider as well.

B.

We grant Jewel's motion to certify an interlocutory appeal and to stay proceedings in this Court pending the appeal. Under 28 U.S.C. § 1292(b), a district court may certify an interlocutory appeal if when it enters an order and believes that the order

(1) involves a controlling question of law,

(2) as to which there is substantial ground for difference of opinion, and

(3) that an immediate appeal may materially advance the ultimate termination of the litigation.[1]

The first two criteria are easily met in this case. Our June 26 opinion and order involved two such controlling questions, one involving the duty of fair representation and the second the proper statute of limitations. At minimum a question is controlling when it would constitute reversible error on appeal if wrongly decided. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974), *cert. denied*, 419 U.S. 855 (1974); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure*, § 3930 (1977) at 159. Both questions plainly meet this standard; they are pivotal. Moreover, there is substantial ground for difference of opinion with respect to both questions. As our opinion described, there was no good precedent for either issue. We had an unusual fact situation

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[1] That section reads in full:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction

(Footnote continued on the following page)

falling into a gap in both doctrines analyzed, and the correct answer is not obvious.

We also find that the third criterion for interlocutory review is met. Limitations issues are particularly appropriate under this element if the other elements are met, since decision of the issue might dispose of the suit, or at least drastically curtail its scope. *See, e.g., Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*, 520 F.2d 289, 291 n.2 (8th Cir. 1975); 16 Wright & Miller, § 3931 at 181. Similarly, immediate appeal of the duty of fair representation issue may also bring a speedier and more efficient end to this suit. If we are reversed, we will avoid going to trial on the merits without the Union; the shape and direction of the suit differs significantly depending on the Union's presence in the suit. As we noted in our June 26 opinion at 5, plaintiffs' two theories of recoveries are mutually exclusive. It will ultimately save cost and time to resolve finally this watershed issue as early as possible.

For all the above reasons, certification of an interlocutory appeal is warranted here. We also believe a stay of lower court proceedings pending appeal is proper here. The next status hearing is hereby set for January 9, 1987, for a report on the progress of the appeal. The parties shall also report promptly any decisions or significant order of the Court of Appeals in this case. It is so ordered.

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1 *(continued)*

> of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

C.

The motions of Jewel and the Union to consolidate this case with No. 85 C 10362 as related under Local Rule 2.31 are granted. We find that the criteria of that Rule are satisfied.

D.

In conclusion, Jewel's motion to reconsider is denied. The motions to consolidate this case with No. 85 C 10362 are granted, as well as Jewel's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b). It is so ordered.

/s/ MARVIN E. ASPEN

Marvin E. Aspen
United States District Judge

DATED 8/12/86

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KELLY MERK, JOSEPH STASZEWSKI, VICKIE MENAGH, DONNA McCORMICK, DAVID THERKIELD, JOHN MALONE, MARLENE WAGNER, MICHAEL DEMARE, WAYNE VOLKER, ELEANORE COLLINS, ANDREW KACHIK, PATRICIA TODD, LINDA SINGLETON, and KEVIN QUAID, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., AMERICAN STORES COMPANY, INC., and UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL NO. 881, Charted by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO and CLC,

Defendants.

NO. 85 C 07876
Judge Aspen

MOTION TO DISMISS

Now comes the Defendant, JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., by its attorneys, Max G. Brittain Jr. and John J. Murphy, Jr., and moves this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss this action in its entirety on the ground that the Second Amended Complaint fails to state a claim upon which relief can be granted. The Second Amended Complaint fails to state a claim in three respects:

(1) The collective bargaining agreement [Exhibit A to the Complaint] upon which Plaintiffs base this breach of

contract action contains an exclusive and mandatory grievance procedure for resolving "any dispute involving the interpretation or application of the provisions of the Contract." Nevertheless, Plaintiffs initiated this action for breach of that contract without attempting to exhaust the contractual grievance procedure.

(2) Under the provisions of the By-laws of UFCW Local 881, any Local 881 member who disagrees with the Local's disposition or settlement of his or her grievance may appeal said disposition to the Local Union Executive Council; any member who fails to so appeal is "deemed to have acquiesced in said disposition." [Article XV, Section F of Local 881 By-laws, attached as Exhibit A hereto] Plaintiffs have failed to attempt to exhaust their intraunion remedy prior to initiating this suit, and they should be deemed to have acquiesced in the prior disposition of their claim by Local 881.

(3) The dismissal with prejudice of the prior breach of contract suit brought by UFCW Local 881 on behalf of Plaintiffs and others (Case No. 84 C 7148) bars litigation of the instant action as *res judicata*. Plaintiffs are privies of Local 881 by virtue of their having invested Local 881 by contract (*i.e.*, the Local 881 By-laws) with "exclusive authority to interpret and enforce the collective bargaining contract . . . to withdraw grievances, settle and compromise grievances and decline to invoke the grievance procedures of a collective bargaining contract." [Article XV, Section A of Local 881 By-laws, attached as Exhibit A hereto.]

For each of the foregoing reasons, Defendant Jewel respectfully submits that the Second Amended Complaint should be dismissed.

Respectfully submitted,

JEWEL FOOD STORES DIVISION,
JEWEL COMPANIES, INC.

By: /s/ MAX G. BRITTAIN, JR.
Max G. Brittain, Jr.

/s/ JOHN J. MURPHY, JR.
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APPENDIX A

BY-LAWS OF THE UNITED RETAIL WORKERS UNION LOCAL NO. 881 CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO, CLC

* * *

ARTICLE XV
APPEALS OF MEMBERS FROM LOCAL UNION'S DISPOSITION OF GRIEVANCES

SECTION A. The Local Union shall have the exclusive authority to interpret and enforce the collective bargaining contract. In accordance therewith, the Local Union shall have the exclusive authority to submit grievances to arbitration, withdraw grievances, settle and compromise grievances and decline to invoke the grievance procedures of a collective bargaining contract.

SECTION B. Any member who disagrees with the disposition of his or her grievance by the Local Union President, or the President's designated representative shall have the right to appeal the decision to the Local Union Executive Council. The appeal shall be submitted, in writing, to the office of the Local Union and shall contain a simple statement of the nature of the grievance and any other matter the member wishes to bring to the attention of the Executive Council.

SECTION C. The member shall submit the appeal within 15 days from the date the member is first advised of the Local Union's disposition of the member's grievance.

SECTION D. The Local Union Executive Council shall consider the appeal at the next regular meeting of the Executive Council. The Executive Council shall treat the appeal as either a request for a review or a request for reconsideration.

SECTION E. The Executive Council shall advise the member of its decision within 30 days from the date of its meeting. There shall be no further appeal from the decision of the Executive Council.

SECTION F. Any member who does not appeal the Local Union's disposition of the member's grievance as provided above shall be deemed to have acquiesced in said disposition.

DEFENDANT'S
EXHIBIT
A

APPENDIX C

29 U.S.C. 152 (3) (1982)

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.